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CHARLES E. WYNN

IN THE

Supreme Court of the United States

October Term, 1951

No. 541

RISS AND COMPANY, INC., A CORPORATION,
Appellant,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

PETITION FOR REHEARING OF PER CURIAM ORDER AFFIRMING JUDGMENT BELOW.

Appellant prays that this Court grant rehearing of its Order of March 3, 1952, which affirmed per curiam the judgment of the three-judge United States District Court for the Western District of Missouri, Western Division. Appellant further prays that the Court note probable jurisdiction in this case, set it down for argument, and afford Appellant the opportunity to brief and argue the merits of the substantial questions of law presented and to have the guidance of explanation or citation in the decision of this Court.

STATEMENT.

Appellant filed this action to enjoin, suspend and permanently set aside certain orders of the Interstate Commerce Commission.[1] A three-judge District Court in the Western District of Missouri, Western Division, in a judgment entered September 27, 1951, sustained the orders and dismissed the complaint. Pursuant to Title 28, United States Code, Sections 1253 and 2101 (b) [based on 38 Stat. 208, 219-221 (1913)], Appellant promptly appealed directly to this Court, the appeal being allowed November 26, 1951. Motions to affirm were filed by Appellees December 13, 1951. In the absence of written or oral argument on the merits of the controversy the Court entered its Order, March 3, 1952, as follows:

> *Per Curiam:* The motions to affirm are granted and the judgment is affirmed. Mr. Justice Black, Mr. Justice Reed, and Mr. Justice Douglas are of the opinion that probable jurisdiction should be noted and the case set down for argument.

This Petition raises two issues which Appellant believes have never before been presented to this Court. The decision of both is necessary not only to the correct disposition of this case, but also to the proper exercise of the Court's appellate jurisdiction.

NEW ISSUES PRESENTED.

1. May this Court, under the Urgent Deficiencies Act, deny Appellant the right of appeal as it existed in equity at the time of the passage of that Act?

2. Should this Court affirm this appeal per curiam without announcing reasons or citations which will enable Appellant and future litigants to determine what has been decided?

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[1] For a full statement see Appellant's Statement as to Jurisdiction, pp. 1-7.

I.

CONGRESS PROVIDED THAT THIS APPEAL SHOULD BE DECIDED ONLY AFTER THIS COURT RECEIVED FULL ARGUMENT ON THE MERITS.

A. The Urgent Deficiencies Act of 1913 Provided for Appeals to this Court in the Manner Taken "Under Existing Law in Equity Cases."

The Urgent Deficiencies Act of 1913, 38 Stat. 208, 219-221, required a three-judge District Court to hear bills to enjoin orders of the Interstate Commerce Commission. Congress considered carefully provisions respecting the manner of appealing directly from such three-judge courts to this Court. The House Report provided that the manner of appeal should be the same as that "under existing law from the Commerce Court . . . ."[2] The Urgent Deficiencies Act as finally enacted stated:

> Such appeals may be taken in like manner as appeals are taken *under existing law in equity cases.*[3] (Emphasis supplied)

In adopting this statute, Congress was acting within its constitutional power. Congress was making regulations for the appellate jurisdiction of this Court. U. S. Const. Art. 3, § 2, Sentence 2.

B. The Urgent Deficiencies Act of 1913 is the Governing Statute in this Appeal.

Congress has never altered the substance of the appeal provision of the Urgent Deficiencies Act of 1913. The Judiciary Act of 1925 incorporated by reference the appeal pro-

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[2] "Such appeals may be taken in like manner as appeals are taken under existing law from the Commerce Court to the Supreme Court." H. R. Rep. No. 64, 63rd Cong. 1st Sess. 3 (1913).

[3] The language was altered in the Senate. 50 Cong. Rec. 5408 (1913).

vision of the Urgent Deficiencies Act.[4] Although apparently inadvertently omitted from the 1926 edition, the 1934, 1940, and 1946 editions of the United States Code included the precise language of the appeal provision of the Urgent Deficiencies Act in 28 U.S.C. § 47(a).

Congress, in 1948, enacted Title 28 of the United States Code. 62 Stat. 928. Section 1253 of Title 28 provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

There is no indication in the committee reports or in the legislative debates that Congress had any intention of altering the manner of appeal required by the Urgent Deficiencies Act. Indeed, the Reviser's Notes state that Section 1253 consolidates Section 47(a) with other Sections of the 1940 Code and cite the Urgent Deficiencies Act as a source. 28 U.S.C. Cong. Serv., Reviser's Notes, Section 1253, p. 1823 (1948).

Since there has been no change by Congress, the manner of appeal required by the Urgent Deficiencies Act governs respecting orders of the Interstate Commerce Commission.

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[4] "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a District Court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise. . . .

"(4) So much of 'an act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money." 43 Stat. 936, at Section 238.

C. In 1913 an Appeal in Equity Comprehended the Right to Present Full Argument on the Merits.

The manner of appeal to which Appellant is entitled, therefore, must be determined by reference to "existing law in equity cases" in 1913.

The Rules of this Court provided in 1913 that appeal cases would not be heard until a complete record and plenary briefs were received covering the merits of the factual and legal controversy. 222 U. S., App'x 12-15 (1911); 226 U. S. 671 (1912). In the 1910, 1911, 1912, and 1913 terms, cases on appeal were decided only after receipt of briefs and opportunity for oral arguments on law and facts.[5]

The Rules of this Court and its treatment of appeals in equity cases, therefore, shows that the "manner of appeal" provided by Congress in the Urgent Deficiencies Act of 1913 included the right to submit plenary argument on the merits.

D. Only in Comparatively Recent Years Has This Court Disregarded the Manner of Appeal Required by the Urgent Deficiencies Act.

On July 1, 1928, this Court required that an appellant disclose "the basis upon which it is contended that this Court has jurisdiction upon appeal to review the judg-

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[5] During the 1910 through 1913 terms this Court decided all direct appeals from the Commerce Court through written opinions with one exception, *Atchison, T. & S. F. Ry. Co.* v. *United States*, 231 U. S. 736 (1913) ("The Lemon Rate Case") which was decided by memorandum per curiam decision. During these same four terms this Court decided per curiam seven appeals involving bills for injunction brought in United States District Courts. *The Merrimack River Savings Bank* v. *Clay Center, Kansas*, 218 U. S. 655 (1910); *Pochin* v. *Denver, Colorado*, 218 U. S. 66 (1910); *United Railways Co. of St. Louis* v. *St. Louis*, 220 U. S. 607 (1910); *Mercantile Trust Co.* v. *Texas & Pacific Ry. Co.*, 223 U. S. 710 (1911); *Ashon* v. *Conservation Comm'n of Louisiana*, 229 U. S. 606 (1913); *Mayor & Aldermen of Vicksburg* v. *Vicksburg Water Works Co.*, 231 U. S. 739 (1913); *Woodward Cotton Co.* v. *City of Woodward*, 232 U. S. 716 (1914).

ment or decree in question." Rule 12, 275 U. S. 603-4 (1928). In support of this Rule this Court cited *Zucht* v. *King*, 260 U. S. 174, 176-77 (1922). Under this Rule, the Court began dismissing some types of appeals without receiving argument on the merits or giving opinions, presumably on the ground that no substantial Federal question was presented. The *Zucht* case, however, upon which the Court relied, came to the Court on a writ of error from a state court. Although this Court dismissed the case on the ground of insubstantiality, this Court's opinion was rendered only after receipt of the transcript, and full briefs and oral arguments on the merits.

From 1928 to 1939, Rule 12 was not specifically limited to appeals from state courts. During this period, the Court disposed of twelve appeals under the Urgent Deficiencies Act by per curiam affirmances. Full consideration by way of briefs and opportunity for oral argument was afforded appellants in all but one of these cases, except where a negative order was involved or where the three-judge district court otherwise was without jurisdiction.[6] In only

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[6] *Memorandum Per Curiam Affirmances of Three-Judge District Court Decisions on Bills to Enjoin the Interstate Commerce Commission 1928—October, 1939.*

a. The following cases were affirmed only after plenary consideration on the merits:

Brady v. *United States*, 283 U.S. 804 (May, 1931)
Akron, C., & Y. Ry. Co. v. *United States*, 284 U.S. 575 (Oct., 1931)
Montana v. *United States*, 290 U.S. 593 (Nov., 1933)
Indian Valley R. Co. v. *United States*, 292 U.S. 608 (May, 1934)
Missouri Pacific R. Co. v. *United States*, 293 U.S. 524 (Oct., 1934)
Cape Fears Railways, Inc., v. *United States*, 294 U.S. 693 (Jan., 1935)
Mississippi v. *United States*, 307 U.S. 610 (May, 1939)

b. The following case was dismissed for want of jurisdiction in the Three-Judge court:

Wishnatzki & Nathel v. *Railway Express Agency, Inc.*, 293 U.S. 532 (1934)

one case, *A. O. Smith Corporation* v. *United States*, 301 U. S. 669 (1937), did the Court affirm a judgment on the merits without plenary consideration. The affirmance of this case apparently resulted from the fact that the issues were similar to those decided by opinion of the Court in the same term in *United States* v. *American Tin Plate Company*, 301 U. S. 402. During this same period, this Court revised Rule 12 to require the Jurisdictional Statement to include "a statement of the grounds upon which it is contended the questions involved are substantial," again citing the *Zucht* case. 297 U. S. 733 (1936). In 1939 this Court apparently recognized the necessity of affording appellants in cases involving *inter alia* Interstate Commerce Commission orders a full hearing by limiting the substantiality requirement to appeals from state courts. 306 U. S. 694.

In October, 1939, however, contrary both to the governing statute and to its Rule 12, this Court affirmed an appeal involving orders of the Interstate Commerce Commission without full briefs and opportunity for oral arguments on the merits. *Hoey, Doing Business as Midland Service Co.* v. *United States*, 308 U. S. 510 (1939). Such summary procedure was used in six appeals in 1939, 1940 and 1941.[7]

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c. In the following cases there were per curiam affirmances without plenary consideration of the lower courts' orders dismissing the bill for lack of jurisdiction on the ground that the I.C.C. order was negative not affirmative, hence not ripe for review (In this period the "negative order doctrine" was good law.):

George Allison & Co., Inc., v. *United States*, 296 U.S. 546 (Nov., 1935)
Crancer v. *United States*, 305 U.S. 567 (Nov., 1938)
Diamond Tank Transport, Inc., v. *United States*, 305 U.S. 567 (Nov., 1938)

[7] *Memorandum Per Curiam Affirmances of Three-Judge District Court Decisions on Bills to Enjoin the Interstate Commerce Commission. October, 1939—March, 1942.*

a. In the following cases this court affirmed per curiam, without plenary consideration, lower court decisions dismissing for want of equity:

In 1942 this Court revised Rule 12 to conform to the practice that had developed. In *McArthur, Doing Business as Anaconda Van Lines* v. *United States*, 315 U. S. 787, this Court affirmed per curiam an appeal under the Urgent Deficiencies Act, stating: "It does not appear that the questions involved in this appeal are substantial." One week after the *McArthur* decision, Rule 12 was revised (April 7, 1942), making the substantiality requirement applicable to all appeals, including those under the Urgent Deficiencies Act, citing the *McArthur* and *Zucht* cases. 316 U. S. 715. This manner of treating such appeals has been used with increasing regularity since that time.

E. Congress Has Obligated This Court to Consider This Appeal on Its Merits.

In the interests of affording the Court a manageable docket and in allowing the Court to give greater attention to cases deemed of most importance, Congress has divided the appellate jurisdiction of this Court into two categories. Certiorari was chosen as a means of permitting this Court discretion in selecting cases for review from most of the types of cases decided by inferior courts. Appeal, on the other hand, included only cases where review was not discretionary. Congressional definition of these categories

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Hoey, Doing Business as Midland Service Co. v. *United States*, 308 U.S. 510 (Oct., 1939)

Quonah, Acme, and Pacific Ry. Co. v. *United States*, 308 U.S. 527 (Jan., 1940)

Philadelphia-Detroit Lines, Inc. v. *United States*, 308 U.S. 528 (Jan., 1940)

Acme Fast Freight, Inc., v. *United States*, 309 U.S. 638 (April, 1940)

Loving v. *United States*, 310 U.S. 609 (April, 1940)

Ready Truck Lines, Inc., v. *United States*, 314 U.S. 580 (Nov., 1941)

b. The following case was affirmed per curiam only after full consideration on the merits:

Scandrett, Trustees v. *United States*, 312 U.S. 661 (March 10, 1941)

produced the Judiciary Act of 1925, 43 Stat. 936, in which Congress provided for an extremely limited class of cases where appeal to this Court was of right. Frankfurter & Landis, *The Business of the Supreme Court* 280 (1928).

Within the category of cases coming to this Court on appeal Congress carefully has established jurisdictional requirements. The sole jurisdictional requirement established for an appeal of the type here involved is whether the case is within the jurisdiction of the statutory three-judge District Court. 28 U. S. C. §§ 1253, 2325. In this case the jurisdiction of the three-judge District Court has never been questioned.

Congress provided in the Urgent Deficiencies Act for a direct appeal to this Court from a statutory three-judge District Court. The reason being, as stated by Mr. Justice Brandeis in *United States* v. *Griffin*, 303 U. S. 226, at 233 (1938):

> In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the decisions thereof.

Despite the mandate of the Urgent Deficiencies Act, and despite the fact that no one ever has doubted the jurisdiction of the three-judge District Court, this Court has, nevertheless, affirmed this appeal without affording Appellate an opportunity to present full argument on the merits. As a practical matter, the affirmance of the judgment in this case is little different from denial of a petition for a writ of certiorari, though the operative papers bear different names. Appellant respectfully submits that this Court erred in the manner in which it disposed of this appeal. Congress has given considerable care to the determination of this Court's appellate jurisdiction. The entire statutory background for this appeal shows that Congress intended Appellant to have an opportunity to present full arguments on the merits.

II.

THIS COURT SHOULD AFFORD APPELLANT AND FUTURE LITIGANTS AN EXPLANATION OF WHAT HAS BEEN ADJUDICATED IN THIS CASE.

This Court's per curiam affirmance of this appeal signifies either a disposition of the case and a pronouncement of law or merely a termination of litigation in favor of the Interstate Commerce Commission. The Court's Order offers no assistance in ascertaining its significance since it contains no reasons or citations.

Perhaps this Court intended its Order to signify no more than that the lower court's result as between Appellant and the Commission shall stand. If so, the disposition of this appeal for practical purposes is similar to a denial of a petition for a writ of certiorari.

Commentators, however, have expressed the view that the per curiam opinion is a pronouncement of law as well as a disposition between the parties.[8] They have often been critical of this Court's use of the per curiam because it has resulted in embarrassing precedents, confusion and increased litigation.[9] If the Order in this case is a pronouncement of law, the Order must mean that the questions presented by Appellant have been settled beyond possibility of successful challenge or that this Court adopted in all respects the opinion of the lower court. It is difficult to believe that the Order conveys either such meaning. It is difficult to believe, for example, that there is a firmly fixed principle of law that orders of the Interstate Commerce Commission are valid and enforceable even though admittedly the Commission made no findings of fact to support a

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[8] See Frankfurter & Landis, *The Business of the Supreme Court at October Term, 1929*, 44 Harv. L. Rev. 1, 10-11 (1930); *Has The Jensen Case Been Jettisoned?*, 2 Stanford L. Rev. 536 (1950); *The Insubstantial Federal Question*, 62 Harv. L. Rev. 488 (1949); Hart, *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 Harv. L. Rev. 579, 601ff. (1940).

[9] Authorities cited in note 8, *supra*.

substantial part of the order. It is difficult to believe that a district court opinion which recites the lack of basic findings but which, nevertheless, sustained the order of the Commission as valid and proper has been adopted by this Court.[10] It is also difficult to believe that there is a fixed principle of law that an order of the Interstate Commerce Commission is valid and enforceable when admittedly the Commission ignored and failed to consider a large portion of the evidence of record in its findings. These are the issues which the court below resolved and which presumably the Order of this Court also resolved. Appellant believes that if these principles are firmly established in the law they are sufficiently important to warrant public expression from this Court.

III.

APPELLANT'S INTEREST IN THIS PETITION.

The order of the Interstate Commerce Commission in this case is in effect. Appellant, therefore, is not prolonging any operations by this Petition.

Appellant is vitally concerned, however, with obtaining a full consideration on the merits of its contentions and a clarification of the decision of the lower court. This petition has been filed because appellant has been effectively denied its statutory right to a hearing on the merits in this Court.

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[10] "In the present case the District Court held that the Commission failed to make any findings whatsoever in explanation of its denial to Riss of authority to operate over U.S. Highway No. 1 between New Haven, Connecticut and Boston, Massachusetts. Nonetheless, although the Court stated that without a specific finding it could not apprehend the reason for the Commission's denial, it failed to remand the proceeding to the Commission for entry of definite and specific findings." Appellant's Statement as to Jurisdiction, p. 9.

CONCLUSION.

For the reasons herein urged Appellant respectfully requests this Court to grant rehearing of its Order of March 3, 1952, to note probable jurisdiction, and to set the case down for argument on the merits of the substantial questions of law presented, affording Appellant an opportunity to brief and to argue orally and giving Appellant and other litigants the guidance of explanation or citation in the decision of this Court.

Respectfully submitted,

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Riss and Company, Inc.

Certificate.

We hereby certify that the foregoing Petition is presented in good faith and not for delay.

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